IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04/12/2003

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

CRL.O.P.No.34232 of 2003

1. Sarijabanu (a)
Janarthani @ Janani

2. Rameeza .. Petitioners

-Vs-

State through
Inspector of Police (L&O)
Silaiman Circle in
Karuppayoorani PS
(Madurai Town)
In Cr.No.188 of 2003 .. Respondent

This criminal original petition is filed under Sec.37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 read with Sec.439 of the Code of Criminal Procedure, 1973 to enlarge the petitioners/ accused 1 and 2 on bail pending investigation in Crime No.188 of 2003 on the file of Karuppayurani Police Station, Madurai Town.

For Petitioners : Mr.Kapil Sibal, Senior Counsel
for Mr.M.Sankarapandian

For Respondent : Mr.I.Subramanian
Public Prosecutor

:ORDER

An application for bail has been brought forth by these petitioners, who are shown as A-1 and A-2 respectively in a case registered by the respondent police under Sections 20(b)(ii)(c) and 25 of the Narcotic Drugs and Psychotropic Substances Act (herein after referred to as NDPS Act), wherein another person, who is shown as A-3, is also accused of the offences punishable under Sections 8(c), 20(b)(ii)(c) read with 27(A) of the NDPS Act.
2. The case of the prosecution, as put forth before the Court below, is that the petitioners who are daughter and mother respectively, are A-1 and A-2, while A-3 is the Driver; and that A-1 and A-2 have committed offences punishable under Sections 8(c) read with 20(b)(ii)(c) of the NDPS Act, while

A-3 committed offences punishable under Sections 8(c), 20(b)(ii)(c) read with 27(A) of the NDPS Act. On completion of the investigation, a final report has also been laid before the Court below.

3. As could be seen from the available materials, the gist of the case of the prosecution is as follows:

(a) On an information received by the respondent police on 10.7.2003 at 10.00 P.M. the Hyundai Accent GLS Car of the first petitioner was intercepted at Madurai Ring Road at Melamadai Junction at about 11.00 P.M. The car was driven by A-3. The first petitioner was found travelling in the car. A search was made, wherein the Ganja weighing about 5 kgs. and Rs.10,00,000/- in cash were recovered from the car. Neither the first petitioner nor the driver had any licence for possession of the said Ganja. The first petitioner was arrested at 11.15 p.m. on that day, when she made a confessional statement to the respondent, pursuant to which 15 kgs. of Ganja and a cash of Rs.30,00,000/- were recovered from the residential premises of the petitioners at No.4/1078-A, Bharath Street, Anbu Nagar, Madurai, at about 1.15 A.M. on 11.7.2003. The second petitioner, who was present therein, was arrested on 11.7.2003 at 1.15 A.M. Both the petitioners did not possess any licence for keeping the said contraband, a narcotic substance. Both the recoveries were made in the presence of two independent witnesses under the cover of a mahazar. About 100 grams of the contraband seized from each of the places were taken for analysis.

(b) Pursuant to the confessional statement made by the second petitioner, the police party took the petitioners to Madras to a house in Door No.486/C, Second South Cross Street, Kabaleeswarar Nagar, Neelankarai, an another residence of both the petitioners, wherein 10 kgs. of ganja and a cash of Rs.1,00,18,000/- were produced by them, besides some item of jewellery. Even for the said contraband also, they did not possess any licence. The recovery was made in the presence of two independent witnesses under a mahazar, and a search list was also prepared. Separate memos as to the recovery effected at Madurai and Chennai respectively were sent to the Deputy Superintendent of Police, Tirupparankundram, Madurai and to the Judicial Magistrate, Alandur, Madras. All procedural formalities relating to the arrest and recovery of the contraband were duly complied with by the respondent, and both the petitioners were taken to Madurai, and they were produced before the learned Judicial Magistrate No.I, Madurai, at 10.30 P.M. on 11.7.2003 and remanded to judicial custody.

4. Having failed in their attempt to obtain bail before the Court of Sessions meant for NDPS Act cases, the petitioners have brought forth the request for bail before this Court.

5. The learned Senior Counsel Mr.Kapil Sibal, advancing his arguments on behalf of the petitioners for bail, made the following submissions:

The respondent police party actually made a trespass into the house of the petitioners situated at Door No.A/1078-A Bharathi Street, Anbu Nagar, Madurai, on 9.7.2003 at about 6.00 a.m., and they were assaulted, and a search was made. The cell phones, pre-paid cards, photos, 3 diaries, R.C. Book, passport, etc., were removed. Then, they were taken to another house at Marudhu Pandian Street, Tahsildar Nagar, and extensive search was made. The Accent Car parked outside their house opposite to Ultra College Students Hostel, was seized by the police, and it was also brought to the Chatrapatti Police Station. The petitioners were actually kept in illegal custody and

severely tortured, and therefrom, on 10.7.2003, at about 10.30 P.M. the petitioners were taken in a police van to their residence at No.486C, Second South Cross Street, Second South Main Road, Kapaleeswarar Nagar, Neelankarai, Chennai, pursuant to which a search was conducted. The police officer seized all the jewellery belonging to the petitioners, including the photographs. At that time one Cook by name Ramaswamy was very well available. Thereafter, the petitioners were brought back to Madurai, at about 10.30 p.m., produced before the Judicial Magistrate No.I, Madurai, and remanded. While so, the prosecution has come forward with a false case as referred to in the charge sheet.

6. Added further the learned Senior Counsel for the petitioners that the movement of the petitioners were restricted from 6.00 a.m. on 9.7.2003, and they were in the custody of the police therefrom. They were tortured and ill-treated by the police. The case of the prosecution that the Accent Car was intercepted; that 5 kgs. of ganja and currency amount of Rs.10,00,000/were seized; that the first petitioner has given a confessional statement; that the driver was arrested by 2315 hours; that 15 kgs. of ganja in a gunny bag and 5 kgs. of ganja in a bag and currency of Rs.30,00,000/- were seized from the house of the petitioners at Anbu Nagar, Madurai; and that the second petitioner was arrested, are all false. The further case of the prosecution that 10 kgs. of ganja and currency of Rs.1,00,18,000/- were recovered from the house of the petitioners at Neelankarai, Madras, is also false. No ganja was seized either from her car or the house at Madurai or at the house at Neelankarai. There was no occasion to seize ganja as put forth by the prosecution.

7. According to the learned Senior Counsel, the following are the circumstances which stand in favour of the petitioners:

(i) There is discrepancy in the alleged recovery of the contraband ganja, as evidenced by the seizer mahazar, Form 95, F.I.R., remand report and Form 91.

(ii) As per F.I.R. 5 kgs. of ganja was said to have been recovered from the car, and 20 kgs. of ganja (15 kgs. in a gunny bag and 5 kgs. in a bag) was said to have been recovered from the house at Anbu Nagar. As per the remand report and Form 91, 10 kgs. of ganja was said to have been recovered from the Neelankarai House, Madras, and thus, the total recovery is 35 kgs. of ganja, according to the prosecution. As per the list of properties sent to the Magistrate in Form 91, the total contraband has been shown as 30 kgs. and not 35 kgs.

(iii) Form 91 in respect of the recovery of ganja from the house at Anbu Nagar refers to only 15 kgs. and not 15 + 5 kgs. The recovery of 5 kgs. of ganja in a bag was not forwarded to the Magistrate as per Form 91, even though the said 5 kgs., according to the F.I.R., was found at Anbu Nagar in a bag.

(iv) Form 98 in respect of the search conducted at the house at Anbu Nagar, Madurai, shows that the quantity of ganja alleged to have been seized in that house, has not been specified. The list showing ' recovered item' does not mention any quantity.

(v) When we look into the Serial Number given in Form 98 search list, they are not in order, but would differ, and the same would indicate the falsity of the case of the prosecution.

(vi) Even as to the search and the preparation of seizure mahazar, the procedure prescribed either under the Cr.P.C. or under the NDPS Act has not been strictly followed.
(vii) One woman Inspector of Police has been a witness. She cannot be an independent witness.
(viii) Apart from the above, two witnesses, who, according to the prosecution, are independent witnesses, are not independent witnesses, since they have been present at both the places at the time of the interception of the car and also at the time of the search of the house.
(ix) A police officer, who has been a part and parcel of the team, cannot be a witness to the same.
(x) The Athatchi, if looked into, would clearly show that the Inspector has not signed the same at the place and time, when it was prepared, according to the prosecution. This would clearly falsify the seizure of ganja and arrest of the petitioners.
(xi) There has been a clear violation of Sections 42, 50, 52 and 57 of the NDPS Act. It would clearly be indicative of the fact that the case is a false one.
(xii) There are sufficient circumstances to indicate not only the violation of the mandatory provisions, but also a false case that has been foisted against them.

8. The learned Senior Counsel in his further argument would submit that the constitutional provision as to the production of the accused within 24 hours from the time of arrest has been violated, and it is a case, where the guidelines postulated by the Apex Court in D.K. BASU VS. STATE OF WEST BENGAL (AIR 1997 SC 610) have not been strictly followed. This would clearly show that there was illegal arrest and detention, and it is also humanly impossible that the petitioners, after the search was made at Madurai, have been brought to Madras, which is situated 500 kms. away, and have been taken back to Madurai and produced before the Magistrate within 24 hours. The confessional statement alleged to have been given either by the first petitioner or by the second petitioner is nothing but a cooked up affair, in order to suit the convenience of the prosecution case. Had it been true that a F.I.R. came to be registered at 0330 hours on 11.7.2003, there could not have been any impediment for the police agency to produce the petitioners before the Magistrate at Madurai. There was no necessity for taking the petitioners along with the contraband to Madras, where they made the search. In the face of the violation of not only the provisions of Cr.P.C. but also the provisions of NDPS Act, it cannot be stated that there is a prima facie case in favour of the prosecution. While there are violations of mandatory provisions of the NDPS Act namely Sections 42 to 57, the limitations contained in Sec.37 of the NDPS Act, cannot be made applicable. Since the prosecution has failed to comply with the mandatory provisions, as postulated under the Act, it would be suffice to grant bail. Therefore, the petitioners are entitled for bail.
9. In answer to the above contentions, the learned Public Prosecutor Mr.I.Subramanian has made the following submissions:
The contentions put forth by the petitioners are of no avail, since the prosecution has brought forth a prima facie case to the notice of the Court. Sec.37 of the Act would make it abundantly clear that unless and until

the conditions what have been brought forth therein, prevail, no bail could be granted. In this case, there was an interception of the first petitioner, who was coming in a car, and in the presence of two witnesses 5 kgs. of ganja and a cash of Rs.10,00,000/- were recovered. She has given a confessional statement, pursuant to which, her house at Anbu Nagar, Madurai, was searched, where A-2 was present, and 15 kgs. of ganja and a cash of Rs.30,00,000/- were recovered under a mahazar. Subsequently, pursuant to the confessional statement given by A-2, they were taken to Madras, and their house at Neelankarai was searched in the presence of two independent witnesses, and 10 kgs. of ganja and a cash of Rs.1,00,18,000/- were also recovered. It is not correct on the part of the petitioners to state that violations of provisions either under Cr.P.C. or under NDPS Act have taken place. At the time of arrest and preparation of recovery mahazar, two independent witnesses were present, and all the recovered ganja and amounts were produced before the Judicial Magistrate concerned on 11.7.2003. It is not correct to state that the procedural formalities as per the mandates under Sections 42 to 57 of the Act have not been complied with, since all the documentary evidence have been produced before the Court. Even assuming that there are discrepancies, the prosecution has got its time to explain the same, and it would be too early for the petitioners to state that there has been a violation of the constitutional provisions. The contention of the petitioners' side that they were detained illegally and subjected to torture is nothing but a myth, since at the time when they were produced before the Judicial Magistrate, not even one complaint was made before the Magistrate at the earliest point of time. It would clearly indicate that they are all inventions for the purpose of bail. In the instant case, though the petitioners have come forward to state that the contraband was planted, nowhere they have stated that at what juncture and how the said contraband was planted. That part, it is not in dispute that a huge sum of Rs.1,40,18,000/- was recovered from the car of the first petitioner and from the houses of the petitioners both at Madurai and Neelankarai. At the time when it was produced before the Court, an application was filed by the Income Tax authorities to return the said amount, to which a detailed objection was filed by the petitioners, in which nowhere they have stated that it is not their money, or they do not make any claim. But, they come forward to deny the same, which would clearly indicate that at that point of time, they had the desire to claim the money as theirs. When the matter was taken up by this Court, they have brought forth two affidavits by two third parties. It is pertinent to point out that the first petitioner has filed an affidavit before this Court, and even in that affidavit, she has not stated that it is not her money, and thus, it would be clear that they want to take their hold on this Rs.1,40,18,000/-. The prosecution has come forward with the specific case to state that there is an inference that this money has come to the hands of the petitioners only by way of illegal trafficking in this narcotic drugs and Psychotropic substances, and it is for the prosecution to prove the same at the time of trial. An application under Sec.173(8) Cr.P.C. has been filed before the lower Court seeking permission for further investigation. Under the circumstances, it would be too early to say that the prosecution has no specific case in that regard. It is true that there are certain discrepancies noticed in the documents filed. But, the prosecution has got its opportunity to explain the same at the time of trial.

10. The learned Public Prosecutor made a full caution that there are

limitations available under Sec.37 of the Act, which have got to be looked into, and would submit that it is not a case, where it can be held at this stage as to whether sufficient materials are available and as to whether the petitioners were not guilty of the offences, and unless and until the petitioners are able to show that there are not guilty of the offences, they are not entitled for bail. Hence, the bail application has got to be dismissed.

11. The Court paid its full attention on the submissions made and had a thorough scrutiny of the entire materials placed before it.

12. As could be seen above, the gist of the prosecution case is that the car of the first petitioner was intercepted on 10.7.2003 at 11.00 p.m. at Madurai Ring Road at Melamadai Junction, when the car was being driven by the third accused, and ganja weighing 5 kgs. and a cash of Rs.10,00,000/- were seized under a mahazar. Pursuant to the confessional statement by the first petitioner, their house at Anbu Nagar, Madurai, was searched, and ganja weighing 15 kgs. and a cash of Rs.30,00,000/- were recovered. Pursuant to the confessional statement made by the second petitioner, they were taken to Madras, where their house at Neelankarai was searched and 10 kgs. of ganja and a cash of Rs.1,00,18,000/- were recovered. Thus, the prosecution has come forward to state that the petitioners 1 and 2 were in possession of 35 kgs. of ganja, a commercial quantity and Rs.1,40,18,000/- in total. A perusal of the available materials would clearly indicate that at the time of preparation of seizure mahazar, three witnesses have attested, out of whom, two are independent witnesses. It is true that one of the witnesses is a Police Officer. The statements of both the independent witnesses have been recorded. It is pertinent to point out that the confessional statements given by the petitioners have been recorded by the police. Now, in a case like this, where such a huge quantity of ganja has been seized and produced before the lower Court, the Court has to necessarily take into consideration the provisions of Sec.37 of the NDPS Act. Under the circumstances, it would be more appropriate to reproduce Sec.37 of the NDPS Act, which runs as follows:

"37. Offences to be cognizable and non-bailable:-
(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-
(a) every offence punishable under this Act shall be cognizable;
(b) no person accused of an offence punishable for offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity shall be released on bail or on his own bond unless-
(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.
(2) The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail."

13. A very reading of the provision would clearly indicate that the sheet anchor is that bail could be granted only in cases where there was no

prima facie case against the accused. Sec.37 of the Act disallows the grant of bail, where there is a prima facie case made out. In the instant case, the trial Court in its first breath has found that there exists prima facie materials and has disallowed the request of the petitioners. It has got to be kept in harmony with the provisions under Sec.37. Making a deviation therefrom and granting bail would be nothing but betraying the essence of Sec.37. The expression 'grounds' in Sec.37 would mean the materials, inclusive of the conclusions of the available facts deducible from the surrounding circumstances of a given case. The words 'not guilty' employed in the said provision would only mean 'not likely to be held guilty at the trial'.

14. It would be more appropriate and advantageous to set out the judicial pronouncements of the Apex Court in the following three cases, wherein the Apex Court has made expressions of the rigor of Sec.37 of the NDPS Act.

(I) It has been held in BABUA ALIAS TAZMUL HOSSAIN VS. STATE OF ORISSA (2001 CRI.L.J. 1169) as follows:

"The other aspect to be borne in mind is that the liberty of a citizen has got to be balanced with the interest of the society. In cases where narcotic drugs and psychotropic substances are involved, the accused would indulge in activities which are lethal to the society. Therefore, it would certainly be in the interest of the society to keep such persons behind bars during the pendency of the proceedings before the Court and the validity of Section 37(1)(b) having been upheld, we cannot take any other view."

(II) In STATE OF M.P. VS. KAJAD (2001) 7 SUPREME COURT CASES 673, it has been held thus:

"For granting the bail the court must, on the basis of the record produced before it, be satisfied that there are reasonable grounds for believing that the accused is not guilty of the offences with which he is charged and further that he is not likely to commit any offence while on bail. It has further to be noticed that the conditions for granting the bail, specified in clause (b) of sub-section (1) of Section 37 are in addition to the limitations provided under the Code of Criminal Procedure or any other law for the time being in force regulating the grant of bail. Liberal approach in the matter of bail under the Act is uncalled for."

(III) In SUPDT., NARCOTICS CENTRAL BUREAU, CHENNAI VS. R.PAULSAMY (2001 CRI.L.J. 117), the Apex Court has held thus:

"In the light of Section 37 no accused can be released on bail when the application is opposed by the public prosecutor unless the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offences and that he is not likely to commit any offence while on bail. Adopting the exceptional course of granting bail to an accused involved in the offence under NDPS Act on ground that there was prima facie violation of Section 52 and there was prima facie non-compliance with Section 57 of the Act, was not proper. Compliance of Ss.52 and 57 is matter which could be established only at the trial and could not be prejudged at the stage of consideration for bail. The minimum which the lower Court should have taken into account was the factual presumption in law position that official acts

have been regularly performed. Such presumption can be rebutted only during evidence and not merely saying that no document has been produced before the Court during bail stage regarding the compliance of the formalities mentioned in those two sections. The lower Court even had not recorded a finding in terms of Section 37 of the Act which is sine qua non for granting bail to an accused involved in the offence under the Act."

From the very reading of the above decisions, it would be abundantly clear that it is for the accused to show that they are not likely to be held guilty at the trial.

15. In the instant case, the prime contention of the petitioners' side is that the mandatory provisions under Sections 42 to 57 of the NDPS Act have been violated. In view of the aforesaid decisions of the Apex Court, it can be well stated that it is too early to consider whether the mandatory provisions have been violated. They have got to be properly considered and decided at the time of trial, when the parties have got an opportunity to lead evidence both oral and documentary before the trial Court, and not at this stage. In the instant case, a detailed counter has been filed, and the bail application has been seriously opposed by the prosecution. The proposition canvassed on the basis of judicial consensus and other salutary considerations bearing in mind the object and scheme of the Act, is that the procedural lapses are not to be overplayed when prayer for bail is considered. Hence, the contention put forth by the petitioners' side that there has been violation of the mandatory provisions of the NDPS Act does not require any consideration at this stage.

16. The next contention that the petitioners were subjected to illtreatment and harassment, cannot also be countenanced, for the simple reason that when they were produced before the Judicial Magistrate, they have not complained of anything. Why not done so, no explanation is coming forth from the petitioners' side.

17. On perusal of the entire materials on hand, the Court is of the considered view that the following circumstances stand against the petitioners:

(a) While making the bail application before this Court, the petitioners have come with a specific averment stating that the first petitioner is a post-graduate in Information Technology, and she has recently cleared IAS preliminary examination, and she is to go for final examination in IAS in 2003. A statement given by the first petitioner before this Court would clearly reveal that she is yet to come out of graduation, and thus, it was a false averment made in the application. At best, it can be well stated that the first petitioner has made a false assertion in order to get bail.

(b) It is not in dispute that Rs.1,40,18,000/- has been recovered from the petitioners. It is contended by the prosecution that this amount came to be possessed by the petitioners by way of illicit trafficking in the narcotic drugs and Psychotropic substances. It is true that no material has been secured by the prosecution at the time of the investigation. It is pertinent to note that when an application was filed by the Income Tax Department praying that the amount was to be returned to the Department, since it was one without any source, shown by the parties, a detailed objection was put forth by the petitioners herein. A perusal of the objection, filed before the trial Court, would clearly indicate that nowhere the petitioners have stated that it is not their money.

(c) It is not in dispute that the petitioners were not employed, and they had got pension of the husband of the second petitioner and also Rs.5,000/- from the brother of the first petitioner. Except this, no source of income is shown by them. Under such circumstances, the petitioners had no explanation to offer before the lower Court how they came into custody of Rs.1,40,18,000/-.

(d) The learned Counsel for the petitioners brought to the notice of the Court that two affidavits have been filed at this stage by two independent parties that the money belonged to them. It remains to be stated that in the course of the affidavit filed by the first petitioner before this Court, nowhere she has whispered that it is not her money. All would go to show that in respect of the amount what has been secured, no explanation is brought forth. Hence, the Court is able to see some force in the contention put forth by the prosecution that their inference had some reason to be believed.

(e) Had it been true that the petitioners were tortured at the time of the police custody, what prevented them from making any complaint before the Judicial Magistrate at the earliest opportunity, no explanation comes forth.

(f) While the prosecution comes with the specific case that 35 kgs. of ganja has been recovered from them and while the petitioners come forward with the case to state that it was planted, at what juncture, where and how such a huge quantity was pla remain unexplained. On the contrary, the prosecution has got two independent witnesses to be examined at the time of trial, as to how they were found in possession of the same and also as to its seizure from them.

18. In the face of the above, at no stretch of imagination it can be stated that there is no prima facie case, and in view of the rigor of law as stipulated under Sec.37 of the Act, it cannot be held that they are not guilty. As could be seen from Sec.37 of the Act, two conditions have got to be satisfied for grant of bail. Firstly that there must be reasonable grounds for believing that he is not guilty of such offence, and secondly that he is not likely to commit any offence while on bail. It is true that in the instant case, no antecedents of the petitioners involving drug trafficking or any offence is brought to the notice of the Court; and that they have permanent residence. But, at the same time, while there is prima facie case that has been brought forth to the notice of the Court, the complaining of violations of the mandatory provisions has got to be tested at the time of trial, and it would be too early to hold that they are not guilty of such offence, since the facts and circumstances do not warrant to hold so. Hence, all the above things have g ot to be testified at the time of trial.

19. Whenever there is a conflict of interest between individual liberty and the interest of the society, the paramount importance must be on the interest of the society and not on the individual liberty. The Court is of the firm view that the contentions put forth by the petitioners' side do not merit acceptance by the Court, and they are not entitled for bail. Therefore, this petition is liable to be dismissed.

20. While dismissing the petition, since the petitioners are in incarceration from 11.7.2003, the Court feels that the trial has got to be conducted expeditiously, and the case has got to be disposed of within a time frame. Hence, the lower Court is directed to frame the necessary charges, conduct the trial and dispose of the case in accordance with law, within a period of 60 days herefrom. If there is any delay caused by the prosecution

side, the petitioners are at liberty to move this Court for appropriate relief at that juncture. The respondent is directed to transfer the first petitioner from the Government Ladies Reception Home, Mylapore, Chennai, to the Central

Prison (Women Cell), Trichy, immediately.
21. With the above directions, this criminal original petition is dismissed.

Index: yes
Internet: yes 4-12-2003
Note to Office:
Issue order copy
on 5-12-2003, and return the
concerned C.D. File to the
Public Prosecutor.

nsv/